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No. 92-726

In the Supreme Court of the United States

OCTOBER TERM, 1992

ANTHONY THOMAS TORCASIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court committed plain error when it instructed the jury that the government was not required to prove that a public official committed or promised to commit a *quid pro quo* in order to convict petitioner under 18 U.S.C. 1951.

2. Whether the district court committed reversible error by refusing to admit into evidence the grand jury testimony of two unavailable witnesses.

3. Whether petitioner's grand jury testimony should have been suppressed because he was not advised of his rights on the record before he testified.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 959 F.2d 503.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1992. A petition for rehearing was denied on August 6, 1992. Pet. App. 10a. The petition for a writ of certiorari was filed on October 26, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of West Virginia,

petitioner was convicted of aiding and abetting extortion under color of official right, in violation of 18 U.S.C. 1951, and making a false statement to a federal grand jury, in violation of 18 U.S.C. 1623. The district court sentenced him to concurrent terms of 36 months' imprisonment on the extortion count and 24 months' imprisonment on the perjury count, to be followed by a three-year period of supervised release, and a $5,000 fine. The court of appeals affirmed. Pet. App. 1a-9a.[1]

1. a. During its winter session of 1986, the West Virginia legislature was scheduled to consider whether the State should legalize gambling. Petitioner, who had worked for years in New Jersey's legalized gambling business, had begun advising a group of investors who hoped to operate a gambling casino in Weirton, West Virginia. The investors included Fred Perone and his brother Ralph. In November 1985, West Virginia Senate President Daniel R. Tonkovich met with the investors to discuss the economic benefits of legalized gambling. The following month, at a similar meeting between Tonkovich and the investors, Fred Perone inquired whether Tonkovich, who owned a small public relations firm, would be interested in conducting a public relations campaign designed to increase public interest in legalized

[1] Relying on its decision in *United States* v. *Dunnigan*, 944 F.2d 178 (4th Cir. 1991), the court of appeals remanded the case for resentencing because the district court had increased petitioner's offense level under the Sentencing Guidelines by two levels on the basis of petitioner's denial of guilt during his trial testimony. The court of appeals subsequently granted the government's motion for a stay of its mandate pending this Court's decision in *United States* v. *Dunnigan*, No. 91-1300 (argued Dec. 2, 1992). See Pet. 3.

gambling. Tonkovich declined. After the meeting, petitioner attempted to give Tonkovich a campaign contribution of $1,000 in cash. Tonkovich refused to accept the contribution. Pet. App. 2a-3a, 6a; Gov't C.A. Br. 4-8.

A month later, after another meeting, petitioner asked Tonkovich to become the investors' "in-state consultant." C.A. App. 83-84. The two men agreed on a $15,000 contract, without specifying what Tonkovich was to do as a "consultant." *Id.* at 85. Tonkovich suggested that the contract be put in the name of Robert Cain, Tonkovich's administrative assistant. Pet. App. 3a; Gov't C.A. Br. 8-10.

Tonkovich subsequently drafted a handwritten contract that was given to Robert D'Anniballe, the investors' attorney, who revised some of its provisions and returned a copy to Tonkovich. The final version called for three $5,000 payments for public relations work to be done in February and March 1986. D'Anniballe made all three payments to Cain in February 1986. Cain transferred $11,400 to Tonkovich and retained $3,600 to pay taxes on the checks that had been made out to him. Pet. App. 3a-4a; Gov't C.A. Br. 10-11.

In February 1986, petitioner, who had met Tonkovich on only two previous occasions, gave Tonkovich $1,000 in cash for his newborn son. In May 1986, petitioner gave Tonkovich an additional $1,000 in cash as a Mother's Day gift for Tonkovich's wife. In June 1986, however, Tonkovich became apprehensive when a Charleston newspaper published articles that questioned his outside business activities and raised the issue of extortion. Tonkovich decided to return the $1,000 Mother's Day gift; but the check

that he sent was never cashed and was sent back to him. Through Cain, Tonkovich returned the $15,000. Pet. App. 4a; Gov't C.A. Br. 13-16.

b. In December 1988, Cain gave federal investigators information that it had been Tonkovich who had dealt with petitioner in connection with the $15,000 payment. Petitioner, who was regarded as a subject rather than a target of the investigation, was subpoenaed to testify before a federal grand jury in Bluefield, West Virginia, on January 5, 1989. Petitioner testified under oath that "I never personally gave Dan Tonkovich no money." C.A. App. 303A.

2. a. Fred and Ralph Perone testified before the grand jury. Fred Perone acknowledged that the investors had agreed to pay $15,000 to a public relations firm that had some connection with Tonkovich. Pet. App. 38a-39a. Ralph Perone could not recall whether petitioner had been at the meeting at which the investors decided to hire the firm. *Id.* at 26a.

Prior to trial, petitioner indicated that he wished to offer into evidence the statements made by the Perones before the grand jury. The government moved *in limine* to exclude the statements as hearsay. At a hearing on the government's motion *in limine*, the district court said that it would exclude the statements because "the hearing has indicated no basis for the admissibility of the grand jury testimony." C.A. App. 45. Although the court left open the possibility that the testimony could be admitted at trial, the defense did not raise the issue again. Pet. App. 6a-7a.

b. Petitioner moved *in limine* to suppress his own grand jury testimony, because he was not represented by counsel and was neither informed that he was a target of the grand jury investigation nor advised on the record of his constitutional rights. The district

court denied the motion on the ground that petitioner had received adequate notice of his Fifth Amendment rights, which were outlined in the materials that accompanied his grand jury subpoena. Pet. App. 7a.

c. At petitioner's trial, Tonkovich testified in detail about the payments he had received from petitioner in 1986. Tonkovich stated that he believed petitioner had attempted to obtain "access and influence" over him through the payments. C.A. App. 102. The district court instructed the jury, with respect to the extortion count, that "[i]t is not necessary that the government prove that any public official, including Senator Tonkovich, committed or promised to commit a quid pro quo, that is, an official action in return for the payment of the money." *Id.* at 252-253. But the court added that the government had to show that petitioner gave Tonkovich the money "with the expectation that Mr. Tonkovich would extend to him some benefit or refrain from some harmful action in his position as a state senator, and that Mr. Tonkovich accepted the thing of significant value knowing it was being transferred to him because of his office." *Id.* at 253. Petitioner did not object to that instruction.

3. a. The court of appeals affirmed. Pet. App. 1a-9a. It rejected (*id.* at 5a-6a) petitioner's contention that under *McCormick* v. *United States*, 111 S. Ct. 1807 (1991), the government was required to prove a specific *quid pro quo* in order to show a violation of the Hobbs Act. The court noted that *McCormick* was expressly limited to the context of campaign contributions, see *id.* at 1817 n.10, and explained that this Court's imposition of a specific *quid pro quo* requirement for campaign contributions in *McCormick* "balance[d] the interest in public integrity with the

practical demands of democra[c]y and avoid[ed] criminalizing legitimate behavior." Pet. App. 5a. The court also pointed out that this case did not involve campaign contributions, but simply "investors in a gambling enterprise who were trying to have gambling legalized in a state where it was illegal." *Id.* at 5a-6a.

The court also upheld the district court's evidentiary rulings. It held that the district court did not abuse its discretion by deciding to exclude the Perones' grand jury testimony and to admit petitioner's grand jury testimony.[2]

b. Petitioner filed a petition for rehearing with a suggestion of rehearing en banc. While the petition and suggestion were pending before the court of appeals, this Court decided *Evans* v. *United States*, 112 S. Ct. 1881 (1992). Petitioner brought the *Evans* decision to the attention of the court of appeals, suggesting that the district court's instruction that a specific *quid pro quo* need not be proved was plain error requiring reversal of petitioner's conviction. The court of appeals denied the petition for rehearing. Pet. App. 10a.

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[2] The court likewise rejected petitioner's contentions that the evidence was insufficient to show that petitioner had paid money with the expectation of receiving some benefit from Tonkovich (Pet. App. 4a-5a); that the district court had erred in excluding from evidence a statement Fred Perone had made to an investigator from the New Jersey Division of Gaming Enforcement (*id.* at 6a); that the district court had erred in not instructing the jury that it was required to find that Tonkovich had overtly solicited payments from petitioner (*id.* at 7a-8a); and that the district court had erred by not instructing the jury that it was required to agree unanimously on at least one of the payments made by petitioner to Tonkovich (*id.* at 8a-9a). Petitioner has not pursued those contentions in this Court.

ARGUMENT

1. Petitioner first contends (Pet. 17-19) that the district court committed plain error when it instructed the jury that the government was not required to prove that Tonkovich "committed or promised to commit a quid pro quo." C.A. App. 252-253.

In *McCormick* v. *United States*, *supra*, which involved the receipt of campaign contributions, this Court held that "[t]he receipt of such contributions is * * * vulnerable under the [Hobbs] Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." 111 S. Ct. at 1816. In *Evans* v. *United States*, *supra*, which involved the receipt of a $7,000 payment that was not dressed up as a campaign contribution, the Court held "that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." 112 S. Ct. at 1889.[3]

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[3] The difference is in the specificity of the agreement. That is, it would not be a violation of the Hobbs Act to make a campaign contribution to a legislator because the legislator was generally in favor of protectionist trade policy and the contributor's business would profit from protectionist legislation. But it would be a violation of the Hobbs Act, under *McCormick*, for a candidate to accept a campaign contribution that was expressly conditioned on the candidate's agreement to vote in a particular manner on a specific matter. It would also be a violation of the Hobbs Act, under *Evans*, for a legislator to accept a cash payoff (not a campaign contribution) from a person the legislator knows to have an interest in protectionist trade legislation, where the legislator knows that the payment was made in return for the legislator's official

In this case, petitioner did not contend that he gave Tonkovich campaign contributions—he "denied that he had paid or offered to pay any money to Tonkovich." Pet. 8. It is clear that the jury did not believe petitioner, but instead accepted Tonkovich's testimony that petitioner gave him money and did so in order to obtain "access and influence" with respect to the gambling legislation. C.A. App. 102. The jury instructions that were given in this case were consistent with *Evans*. While the jury was instructed that it did not need to find that Tonkovich agreed to perform a specific act in exchange for the money he received, it was told that, in order to convict, it had to find that petitioner gave Tonkovich money "with the expectation that Mr. Tonkovich would extend to him some benefit or refrain from some harmful action in his position as a state senator, and that Mr. Tonkovich accepted the thing of significant value knowing it was being transferred to him because of his office." *Id.* at 253. That was sufficient to satisfy *Evans*, for it established that petitioner believed the payment was made "in return for official acts," 112 S. Ct. at 1889; *i.e.*, the instruction advised the jury that it had to find that petitioner made the payment to ensure that Tonkovich would not give petitioner "less favorable treatment" with respect to his official duties in connection with the gambling legislation. *Evans*, 112 S. Ct. at 1892-1893 (Kennedy, J., concurring).

Moreover, even if the instructions in this case did not set forth with ideal precision the nature of the agreement required to trigger Hobbs Act liability,

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acts of support for protectionist trade policies, even if no specific act was promised in exchange for the payment.

that issue is not properly presented here, because petitioner did not object to the court's instructions on that ground, and the instructions cannot be said to constitute plain error. It is clear that no "miscarriage of justice" occurred on account of any imprecision in the jury instructions. *United States* v. *Young*, 470 U.S. 1, 16 (1985). Petitioner did not defend on the theory that he had made legitimate payments to Tonkovich. To the contrary, he denied making any payments at all. It was clear that, if payments were made, they were made so that Tonkovich, the President of the West Virginia Senate, would at least not oppose petitioner's efforts to have gambling legalized in West Virginia. Thus, the precise nature of the agreement between petitioner and Tonkovich was not an issue in this case—the issue in dispute at trial was whether petitioner gave Tonkovich money, and the jury concluded that he did. For that reason, any error in the court's instructions did not rise to the level of plain error. This case is therefore not an appropriate vehicle for further refining the specificity of the requirement of an agreement to perform official acts in a case not involving a campaign contribution.

2. Petitioner next contends (Pet. 20-23) that the district court committed reversible error by excluding the Perones' grand jury testimony. Petitioner characterizes that testimony as showing that it was the Perones, and not petitioner, who bribed Tonkovich. Petitioner contends that the testimony should have been admitted under Fed. R. Evid. 804(b)(1), which authorizes the admission of former testimony, such as grand jury testimony, if the prosecutor "had an opportunity and similar motive to develop the testimony." *Ibid.* Petitioner argues that the district

court's failure to admit the testimony under Rule 804(b)(1) is contrary to this Court's decision in *United States* v. *Salerno*, 112 S. Ct. 2503 (1992).

This contention is without merit. The principal difficulty with petitioner's contention is that the argument made in the petition for a writ of certiorari bears no relation to the argument made to the district court by petitioner's trial lawyers (who were different than petitioner's appellate counsel). First, petitioner did not argue to the district court that the Perones' testimony before the grand jury exculpated petitioner. Indeed, at the hearing petitioner did not explain why he wanted to admit the testimony, but merely said that "we should have the opportunity to use [it] for whatever purposes that are relevant to the case and material to the case," such as "to establish other facts in the case." C.A. App. 44-45. And in the district court, petitioner did not argue that the Perones' grand jury testimony was admissible under Rule 804(b)(1). Rather, petitioner relied on the "catchall" exception, Fed. R. Evid. 804(b)(5), which provides for the admission of hearsay having "circumstantial guarantees of trustworthiness" under certain conditions. But when the district court asked petitioner's counsel what "indicia of reliability" there were to support the admission of the Perones' grand jury testimony, counsel responded that "it's a difficult question for us to answer," and added that "since the government has at least relied in some extent upon the grand jury testimony for the purposes of indicting this defendant, that that gives it the aura of responsibility and trustworthiness." C.A. App. 41.

The government did not understand the Perones' grand jury testimony to exculpate petitioner. At the

hearing, the United States Attorney characterized the testimony as being that "I didn't know anything personally about the hiring of Mr. Tonkovich." C.A. App. 43. The government thought that petitioner wanted to introduce the grand jury testimony in order to impeach it with subsequent hearsay testimony in which Fred Perone stated clearly that he had hired Tonkovich. *Id.* at 43-44. And it was the government—not petitioner—that suggested that there was an argument that the grand jury testimony was admissible under Rule 804(b)(1), C.A. App. 43, although the U.S. Attorney went on to argue that the requirements of that Rule—particularly the requirement that the government have a motive to develop the testimony—were not satisfied. *Id.* at 44. In any event, petitioner did not endorse the argument that the testimony was admissible under Rule 804(b)(1), but persisted in arguing that the testimony was admissible under Rule 804(b)(5). C.A. App. 44-45. The district court concluded the hearing by correctly stating "that the hearing has indicated no basis for the admissibility of the grand jury testimony." *Id.* at 45. The court added that it was "not entirely precluding it at this time" (*ibid.*), but petitioner made no subsequent effort to reopen the matter.

Because petitioner did not argue the admissibility of the Perones' grand jury testimony under Rule 804(b)(1), he failed to satisfy one of the principal requirements for admission of evidence under that rule—showing that the government had "an opportunity and similar motive to develop the testimony" during the grand jury proceeding. See *Salerno*, 112 S. Ct. at 2507. That requirement is not automatically satisfied whenever the defendant seeks to admit

testimony by persons who were called by the government as witnesses before the grand jury. See *id.* at 2508-2509.[4]

Moreover, testimony that the Perones were involved in "hiring" Tonkovich was not helpful to petitioner. There was no dispute that the investors' lawyer, D'Anniballe, acting on behalf of the investors with the approval of Fred Perone, had made the three $5,000 payments to Cain. See C.A. App. 167-168 (D'Anniballe testified that he received a handwritten contract from Fred Perone, and prepared a typewritten contract and a check payable to Cain only after checking with Fred Perone); *id.* at 195-196 (hotel employee Steve Pahides testified that Fred Perone annotated a handwritten contract that Pahides, at Perone's direction, later delivered to D'Anniballe); *id.* at 205 (investor Jack Slotoroff testified that Fred Perone held himself out as ultimately responsible for hiring and paying Tonkovich's firm). But, contrary to petitioner's assertions that the investors were separate from him, see Pet. 22, D'Anniballe's testimony showed that petitioner had a 13 or 13½% interest in the corporation, while the Perones' had a larger interest. C.A. App. 162-163. In short, the evidence that the Perones participated in the payments to Tonkovich was not exculpatory

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[4] Petitioner notes that on remand from this Court, a panel of the Second Circuit held that the government in the *Salerno* case had a sufficient opportunity and motive to develop the testimony at issue there. 974 F.2d 231 (1992). The full court of appeals has recently granted en banc review in that case, however, so the panel decision has been vacated and is not entitled to any precedential weight. No. 88-1464 (en banc review granted Nov. 25, 1992).

as to petitioner, because the evidence showed that the Perones and petitioner all played a role in making payments to Tonkovich. It is therefore highly unlikely that admission of the statements made by the Perones before the grand jury would have affected the outcome of this case.

3. Finally, petitioner contends (Pet. 23-26) that the court of appeals erred when it affirmed the district court's refusal to suppress petitioner's grand jury testimony, which provided the basis for his perjury conviction. This contention likewise lacks merit.

Petitioner does not dispute that he received an "Advice to Grand Jury Witnesses" form with his grand jury subpoena. That form advised petitioner, among other things, that anything he said before the grand jury might be used against him in the grand jury or in court, that he had a right to consult an attorney before testifying, that he could have his attorney outside the grand jury room, and that he would be afforded a reasonable opportunity to step outside to consult with counsel. C.A. App. 70. Petitioner argues (Pet. 25), however, that he was a "target" of the investigation, and should have been further apprised during his appearance of his right not to incriminate himself. He asserts (*ibid.*) that the grand jury proceeding violated Department of Justice policy as contained in Section 9-11.150 of the United States Attorneys' Manual (Oct. 1988), which states that federal prosecutors "should" give "subjects" and "targets" of investigations warnings in front of the grand jury, since he was not advised of his rights on the record before the grand jury. He also contends

(Pet. 25) that the prosecutors' conduct undermined the fundamental fairness of the proceeding.[5]

Petitioner's reliance on the United States Attorneys' Manual is misplaced. The Manual is quite clear that the guidelines it sets forth are not intended to provide a defendant with any substantive or procedural rights. See Manual, Section 1-1.100 (Oct. 1988). Moreover, the Manual is not statutorily mandated and confers no rights upon criminal defendants. See *United States* v. *Caceres*, 440 U.S. 741 (1979) (IRS regulations governing the conduct of electronic surveillance not enforceable by a defendant seeking exclusion of evidence against him). Thus, even where the internal Department of Justice policies set forth in Section 9-11.150 of the Manual are not followed, suppression of a defendant's grand jury testimony is not warranted. See *United States* v. *Pacheco-Ortiz*, 889 F.2d 301, 303, 311 (1st Cir. 1989) (grand jury "target" was given neither a written nor an on-the-record warning against self-incrimination).

Furthermore, it is settled law that the Constitution does not bar a prosecution for perjury before the grand jury simply because the defendant had not been advised of his Fifth Amendment privilege against self-incrimination. *United States* v. *Mandujano*, 425

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[5] Petitioner asserted for the first time on appeal that the prosecutors who conducted the grand jury proceeding were guilty of misconduct. Assuming *arguendo* that the issue is properly before this Court, petitioner's contention (see Pet. 25-26) lacks merit. Although the prosecutors' disbelief of petitioner's testimony was apparent, petitioner was not abused or otherwise treated unfairly. In fact, the prosecutor who questioned petitioner specifically advised him of the possibility of perjury charges and gave him an opportunity to recant his false statements. See C.A. App. 331-332.

U.S. 564, 582 (1976) (plurality opinion); *id.* at 584-585 (Brennan, J., concurring in the judgment); *id.* at 609 (Stewart, J., concurring in the judgment); see *United States* v. *Washington*, 431 U.S. 181 (1977); *United States* v. *Wong*, 431 U.S. 174, 178-179 (1977); see also *Bryson* v. *United States*, 396 U.S. 64, 72 (1969) ("it cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked"). As this Court has held, "grand jury witnesses, including those * * * targeted for indictment, may be convicted of perjury on the basis of their false grand jury testimony even though they were not first advised of their Fifth Amendment privilege against compelled self-incrimination." *United States* v. *Washington*, 431 U.S. at 182 n.1 (citing *Mandujano* and *Wong*).

In this case, the courts below correctly found (see Pet. App. 7a) that the "Advice to Grand Jury Witnesses" form that petitioner received adequately apprised him of his Fifth Amendment rights. Thus, even though, as the court of appeals remarked (*ibid.*), the better practice would have been to advise petitioner of those rights on the record before the grand jury, that court was correct in its determination that the district court did not abuse its discretion when it declined to suppress petitioner's false testimony before the grand jury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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